Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Petitions of Cellular	)	WT Dockets 05-193, 05 - 194
Telecommunications and	)	
Internet Association and	)	
Suncom Operating Company L.L.C.	)	
for Declaratory Rulings	)	

Comments

United States Cellular Corporation ("USCC") hereby files its Comments on the above-captioned petitions for declaratory ruling.[1] USCC supports the petitions filed by Suncom and CTIA and also requests that the FCC rule, clearly and unequivocally, that early termination fees ("ETFs") in wireless service contracts are "rates charged" for commercial mobile services within the meaning of Section 332(c)(3)(A) of the Communications Act. Thus, any application of state laws to prohibit, modify, or condition the use of the ETFs constitutes prohibited rate regulation. Accordingly, such state action must be pre-empted by the FCC pursuant to Section 332(c)(3)(A).

USCC will not repeat the definitive legal case for preemption set out in the petitions. We write separately to emphasize what we consider to be the most crucial arguments for pre-emption now before the Commission.

[1] See Public Notice, "Wireless Telecommunications Bureau Seeks Comments on Petition for Declaratory Ruling filed by CTIA Regarding Whether Early Termination Fees Are "Rates Charged" Within 47 U.S.C. Section 332(c)(3)(A), DA 05-1389, released May 18, 2005; "Wireless Telecommunications Bureau Seeks Comments on Petition for Declaratory Ruling filed by Suncom and Opposition and Cross Petition for Declaratory Ruling filed by Debra Edwards, Seeking Determination of Whether State Law Claims regarding Early Termination Fees are Subject to Preemption under 47 U.S.C. Section 332(c)(3)(A), DA 05-1390, released May 18, 2005.

I. The FCC Must Uphold The Integrity of Section 332(c)(3)(A) If National Wireless Competition Is To Be Preserved

In 1993, Congress took a bold, controversial, and experimental step, "dramatically revis[ing] the regulation of the wireless telecommunications industry" regarding CMRS rates.[2] It amended the Communications Act to deny states "any authority" to regulate the rates charged by wireless service providers. Congress also amended the Act to allow the FCC to regulate (or forbear from regulating) intrastate wireless services.[3] This decision, in favor of deregulating wireless rates, reflected beliefs that the wireless services would best flourish in a free market and that the public interest did not require the wireless industry to endure the multiple and conflicting layers of rate regulation to which the wireline industry had been subjected. Now, twelve years later, the results of that experiment are in and it can be judged a resounding success.

In December 1993, there were only 16,009,461 cellular subscribers.[4] As of August 3, 2005, according to the CTIA website, there are now 193,326,929 wireless subscribers, a huge increase, reflecting the evolution of wireless from a specialty service to an integral part of the nation's telecommunications infrastructure. National carriers and regional wireless networks provide virtually ubiquitous coverage, with customers being able to choose among a myriad of service options from competing carriers. As the above numbers indicate, the American people have embraced wireless service.

Also, as the FCC has concluded in its two most recent wireless competition reports, there is "effective competition" in the CMRS marketplace.[5] The Eighth Competition Report, issued in 2003, noted increases in: (a) wireless minutes of use; (b) the number of wireless subscribers; and

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[2] Connecticut Department of Public Utility Control v. FCC, 78 F.3d 842, 845 (2nd Cir. 1998).
[3] 47 U.S.C. §332(c)(3)(A); 4 U.S.C. §152(b).
[4] See In the Matter of Telephone Numbers Portability, First Report and Order and Further Notice of Proposed Rulemaking 11 FCC Rcd 8352, 11 51 n. 150 (1998).

(c) the average revenue per subscriber, while also recording "downward price trends, the continued expansion of mobile networks into new and existing markets, [and] high rates investment."[6] The Ninth Competition Report, issued in 2004, also affirmed the presence of "effective competition in the CMRS marketplace, " as well as large increases in wireless minutes of use and numbers of subscribers, and a "competitive pricing marketplace."[7] The wireless industry is thus a textbook example of the power of free market competition to enhance consumer welfare and serve the public interest, without regulation of rates by either the federal or state governments.

Now, however, that achievement is in peril, in part owing to the proliferation of state ETF lawsuits, which, if successful, will have the direct and inescapable effect of controlling wireless rates. The CTIA Petition (pp. 2-7, 23-27) sets forth succinctly the ETF lawsuits now pending across the country and describes the varying legal theories under which those suits have been brought. ETFs are alleged to be "unconscionable," "unreasonable" and to constitute "contracts of adhesion." They should, some litigants argue, be subject to "quantum meruit" analysis, under which a court determines how much of an ETF a carrier would be entitled to in a given case.

However, what all such suits overlook is the fact that ETFs are integral parts of a carrier's rate structure and hence cannot be regulated by the states, any more than a carrier's "per minute" charges can be. ETFs allow carriers to charge customers lower initial and monthly charges than they otherwise would have to charge to recoup their customer acquisition costs. ETFs result in

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[5] In the Matter of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, 18 FCC Rcd 14783 (2003) ("Eighth Competition Report").
[6] Eighth Competition Report, 9957, 59.
[7] In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services Ninth Report 19 FCC Rcd 20592 (2004) ("Ninety Competition Report").

lower rates, increased subscribership and beneficial "network effects." Thus, they promote both wireless and intermodal competition.

A successful attack on ETFs will have the inevitable effect of raising rates, as carriers will have to find alternate means of protecting themselves from wrongful termination of contractual service arrangements. By any reasonable reading of Section 332(c)(3)(A), such a result would constitute rate regulation, as well as being bad public policy. We would also submit that such cases are not analogous to state court cases involving alleged carrier misrepresentation of their service areas or false advertising or failures to disclose a rate or rate practice, which might rightly be considered to have only an "incidental" effect on rates if decided adversely to the carrier. These cases often, for example, request findings requiring refunds of payments to carriers voluntarily made by customers for carrier services, and thus constitute an attempt at rate regulation.

II. In Light of the Legal Confusion Which Has Been Engendered, It Is Urgent that the FCC Act Soon

The petitions of CTIA and Suncom, as well as the voluminous filings of Suncom's state court adversaries, Debra Edwards et al, describe the illogical distinctions some courts have adopted to get around the clear language of Section 332 (c) (3) (A) in order to obtain jurisdiction over carrier rate structures. Assuming, however, that the FCC is persuaded by the analysis of Suncom and CTIA that such actions are unlawful, it is urgent that the FCC now clearly say so, as a previous FCC ruling did not provide the necessary clarity on this point.

In 1999, the FCC made its initial attempt at resolving the matters at issue here. The FCC's order held that Section 332 (c) (3) (A) did bar states from prohibiting wireless carriers from charging for incoming calls or charging in whole minute increments, as such actions constituted an indirect form of rate regulation. The FCC further explained:

> "We find that the term" rates charged" in Section 332 (c) (3) (A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these. Accordingly, states may not prescribe how much may be charged for those services, but also may not prescribe the rate elements for CMRS or specify which among the CMRS services provided can be subject to charges by CMRS providers.[8] (emphasis supplied)

However, the Southwestern Bell Mobile Order also held that there are "billing " and other types of disputes which may be regulated by states under their contract or consumer fraud laws, as they may fall within the "other terms and conditions" of CMRS service which states were still permitted to regulate under Section 332.[9] However, the FCC failed to establish clearly that disputes over "rate structures," including ETFs, are not included within the category of "billing" disputes which courts can adjudicate. This omission has generated much confusion and litigation, and has given state courts so inclined an opportunity to assert jurisdiction over ETFs.

The FCC can and should now close this open door, through which plaintiffs' lawyers and their clients are eager to enter. The Commission should hold that ETFs which are part of otherwise applicable and valid contracts between CMRS carriers and their customers are not a proper subject of state court evaluation and adjudication. Such adjudication would inevitably have a sufficiently direct impact on the "rates charged" by wireless carriers as to constitute the "regulation" of such rates, which is forbidden by Section 332 (c) (3) (A) of the Communication Act.

By so doing, the FCC will not only fulfill its statutory obligation to uphold its governing statute, it will save its CMRS licensees the millions of dollars they would otherwise have to

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[8] Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order, 14 FCC Rcd 19898, 19907 ¶ 20 (1999) ("Southwestern Bell Mobile Order").

spend to oppose these frivolous lawsuits, thus enabling those financial resources to be used for more productive purposes. Also, the Commission will uphold the principles of competition and economic liberty, which have helped to create one of America's great industries during the past decade.

Respectfully, submitted

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[9] Ibid, ¶ 7.